UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	
This Document Relates To:	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	Civil Action No. H-01-3624 (Consolidated)
Plaintiffs,	§	
vs.	§	
ENRON CORP., et al.,	§	
Defendants.	§	

MOTION TO DISMISS OF DEFENDANTS BARCLAYS PLC, BARCLAYS BANK PLC AND BARCLAYS CAPITAL INC. AND BRIEF IN SUPPORT

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MOTION TO DISMISS OF DEFENDANTS BARCLAYS PLC, BARCLAYS BANK PLC AND BARCLAYS CAPITAL INC. AND BRIEF IN SUPPORT

Pursuant to Federal Rule of Civil Procedure 12(b)(6), defendants Barclays Capital Inc. ("Barclays Capital") and Barclays Bank PLC ("Barclays Bank") hereby move this Court for dismissal of all claims asserted against them in the First Amended Consolidated Complaint (the "Amended Complaint") on the ground that they are barred by the applicable one-year statutes of limitations. For the same reason, defendant Barclays PLC ("Barclays PLC") moves for dismissal of the "controlling person" claims asserted against it under Section 15 of the Securities Act of 1933 (the "1933 Act") and Section 20(a) of the Securities Exchange Act of 1934 (the "1934 Act"). Barclays Capital and Barclays PLC also move to dismiss the claims brought against them under Sections 12(a)(2) and 15 of the 1933 Act, respectively, concerning the "Yosemite Securities Offering" on the grounds that (i) the named plaintiffs lack standing to assert these claims because none is alleged to have purchased the Yosemite securities, and (ii) the Yosemite Securities Offering was not made pursuant to a prospectus.[1]

Preliminary Statement

On October 16, 2001, according to plaintiffs, Enron Corporation ("Enron") "shocked the markets" by announcing it was taking $1.0 billion in charges and

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[1] This motion does not seek to reargue the Court's December 20, 2002 Order denying the motion of Barclays PLC to dismiss the prior Consolidated Complaint. However, Barclays PLC, and now newly added defendants Barclays Capital and Barclays Bank as well, maintain that plaintiffs' claims are precluded by *Central Bank* for all of the reasons expressed in Barclays PLC's May 8, 2002 and June 24, 2002 memoranda in support of its motion to dismiss. The Barclays defendants' position regarding *Central Bank* is further supported by at least one decision rendered after this Court's December 20, 2002 decision. *See In re Homestore.com, Inc. Sec. Litig.*, 252 F. Supp. 2d 1018 (C.D. Cal. 2003).

reducing shareholders' equity by $1.2 billion. (Am. Compl. ¶ 61.) Within days, the SEC announced an investigation of Enron, the first complaint in this consolidated case was filed, and Enron restated its financial results for 1997 through 2000. Only weeks later, on December 2, 2001, Enron filed for bankruptcy. On April 8, 2002, Lead Plaintiff, on behalf of a putative class of Enron shareholders, filed a Consolidated Complaint, asserting claims under Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 thereunder against many individuals and entities, including Barclays PLC and several other financial institutions.

Now, more than a year and a half after Enron "shocked the markets" by announcing its restatement and its bankruptcy, and more than a year after plaintiffs filed their Consolidated Complaint naming the parent companies of the financial institutions (including Barclays PLC) as defendants in this litigation, plaintiffs belatedly seek (i) to add as defendants Barclays Bank and Barclays Capital (along with subsidiaries and affiliates of other financial institutions), and (ii) to add previously unasserted claims under Sections 12(a)(2) and 15 of the 1933 Act against Barclays Capital and Barclays PLC, respectively, based on a securities offering that was identified by plaintiffs in the Consolidated Complaint more than a year ago but was not the basis of any claim.

All the claims asserted against Barclays Capital and Barclays Bank are barred by the applicable one-year statutes of limitations. Specifically, claims under Section 10(b) of the 1934 Act and Section 12(a)(2) of the 1933 Act are barred if not brought within one year after plaintiffs knew or should have known the facts constituting the alleged violation. Here, plaintiffs had notice of the facts giving rise to the alleged securities law violations as early as October 16, 2001 when Enron's earnings release

"shocked the markets." Even leaving that aside, Enron declared bankruptcy on December 2, 2001, amidst a flood of publicity and following Enron's November 2001 restatement of earnings, so notice by then would be indisputable. And in their April 8, 2002 Consolidated Complaint, filed more than one year before the current Amended Complaint, plaintiffs set forth nearly all the factual allegations that are now alleged as the basis of the claims against Barclays Capital and Barclays Bank.

The "relation back" provision of Federal Rule of Civil Procedure 15(c)(3) does not salvage plaintiffs' untimely claims. The Fifth Circuit has held that Rule 15(c)(3) is available only when a plaintiff has misnamed the defendant or mistakenly sued the wrong defendant. Neither circumstance is present here. Plaintiffs have never contended (nor could they) that they misnamed or mistakenly named Barclays PLC in the Consolidated Complaint. Indeed, Barclays PLC is still named as a defendant in the Amended Complaint, and plaintiffs seek to add (not substitute) Barclays Capital and Barclays Bank as defendants along with their ultimate parent holding company.

Moreover, even if plaintiffs had mistakenly named Barclays PLC in the prior Consolidated Complaint, Barclays Capital and Barclays Bank did not know and had no reason to know, as required by Rule 15(c)(3), that plaintiffs had "mistakenly" failed to sue them. In fact, the allegations of the Consolidated Complaint demonstrate that plaintiffs deliberately chose to assert claims against only the parent companies of the financial institution defendants, including Barclays PLC. Because it was apparent that plaintiffs made a strategic decision to sue only Barclays PLC, there was no reason for Barclays Capital and Barclays Bank to believe that it was only the result of a mistake that they were not named as defendants.

In addition to being untimely, plaintiffs' new claims under Sections 12(a)(2) and 15 of the 1933 Act based on the private offering of Linked Enron Obligations ("LEOs") by the Yosemite Securities Co. Ltd. (the "Yosemite Securities Offering") should be dismissed for at least two independently sufficient reasons. First, the named plaintiffs have no standing to assert these claims because none is alleged to have purchased the LEOs. Without standing to assert claims in their own right, the named plaintiffs lack standing to assert such claims on behalf of a class. Second, the Yosemite Securities Offering was a non-public offering. Thus, the Yosemite Securities Offering Memorandum upon which plaintiffs' claim purports to be predicated is not a "prospectus" and cannot form the basis of a Section 12(a)(2) claim.

PLAINTIFFS' AMENDED COMPLAINT

On May 14, 2003, plaintiffs filed their Amended Complaint. In this pleading, plaintiffs for the first time assert claims under Section 10(b) of the 1934 Act and Rule 10b-5 thereunder against Barclays Bank and Barclays Capital, two subsidiaries of Barclays PLC. (*See* Am. Compl. ¶¶ 993-997.) In addition, plaintiffs assert claims under Sections 12(a)(2) and 15 of the 1933 Act against Barclays Capital and Barclays PLC, respectively, the latter as a "controlling person." (*See id.* ¶¶ 1016.1-1016.9.) Barclays PLC remains a defendant on plaintiffs' claims under Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5, as it was in the prior Consolidated Complaint. (*See id.* ¶¶ 993-997.)

Although the Amended Complaint adds Barclays Capital and Barclays Bank (and keeps in Barclays PLC) as defendants and adds 1933 Act claims, it does not contain a single allegation explaining why Barclays Capital and Barclays Bank (or the

subsidiaries of the other financial institutions added in the Amended Complaint) were not named in the Consolidated Complaint. (*See, e.g., id.* ¶¶ 100-108.) Indeed, it is clear that plaintiffs made a strategic decision to sue in the prior Consolidated Complaint only the parent companies of the financial institutions knowing that in many instances — and in Barclays' case, all instances — only subsidiaries of the parent companies were involved in the alleged transactions with Enron.[2] Most of the allegations of the Amended Complaint as to the Barclays entities are the same as those in the Consolidated Complaint. In particular, the section of the Amended Complaint purporting to detail the "Involvement of Barclays" is virtually identical to that found in the Consolidated Complaint. (*Compare* Am. Compl. ¶¶ 750-761 *with* Consol. Compl. ¶¶ 750-761.)[3]

With respect to plaintiffs' claim under Sections 12(a)(2) and 15 of the 1933 Act against Barclays Capital and Barclays PLC, respectively, the Amended Complaint does add allegations about the Yosemite Securities Offering (primarily excerpts from the Offering Memorandum) that were not contained in the Consolidated Complaint. (*Compare* Am. Compl. ¶¶ 641.12-641.16 *with* Consol. Compl. ¶¶ 678, 753.) These additional allegations are unavailing, however, because plaintiffs do not allege anywhere in the 645-page Amended Complaint — nor could they — that the LEOs were

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2 *See* Consol. Compl. ¶ 106 ("Defendants Barclays PLC is a large integrated financial services institution that through its controlled subsidiaries and divisions (such as Barclays Capital (collectively "Barclays")) provides commercial and investment banking services"); *see also id.* ¶¶ 100-105, 107-108 (for similar allegations against the other financial institution defendants).)

3 Although the Amended Complaint mentions the alleged participation of Barclays Bank in transactions not referenced in the Consolidated Complaint, the Amended Complaint does not contain a single allegation describing these transactions, other than to characterize them in wholly conclusory fashion as "fraudulent." (*See* Am. Compl. ¶ 106(b).)

sold in a public offering or pursuant to a prospectus. As the Yosemite Securities Offering Memorandum makes clear, the LEOs were sold in a non-public offering outside the United States in reliance on Regulation S of the 1933 Act pursuant to an "Offering Memorandum." (*See* Affidavit of Jonathan H. Hurwitz, dated June 17, 2003 ("Hurwitz Aff."), attaching the Yosemite Securities Offering Memorandum as Exhibit ("Exh.") C to the Motion of Citigroup to Dismiss the First Amended Complaint, at S-1, 8, 54, 55.)[4] Moreover, although plaintiffs allege that "Plaintiffs *or* members of the Class" purchased the LEOs from the "underwriters/initial purchasers," (*see* Am. Compl. ¶ 1016.4), neither the Amended Complaint nor the certifications attached to the Amended Complaint or Consolidated Complaint list a single purchase of the LEOs by the Lead Plaintiff or any of the other named plaintiffs.

ARGUMENT

A complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) if plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); *Holmes* v. *Texas A & M Univ.*, 145 F.3d 681, 683 (5th Cir. 1998). A motion to dismiss should be granted if claims are barred by the statute of limitations and if the plaintiffs lack standing to sue. *See Collins* v. *Fed. Home Loan Mortgage Corp.*, No. Civ.3:01-CV-0695-H, 2002

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[4] The LEOs were required to have a "private placement legend" that, among other things, contained the following language: "The [LEOs] have not been registered under the United States Securities Act of 1933 . . . or any state or other securities laws. Neither this security nor any interest or participation herein may be reoffered, sold, assigned, transferred, pledged, encumbered or otherwise disposed of in the absence of such registration or unless the transaction is exempt from, or not subject to, the registration requirements of the Securities Act." (*See* Hurwitz Aff., Exh. C, at 55.)

WL 1268042, at *2 (N.D. Tex. May 31, 2002) (granting motion to dismiss on statute of limitations grounds); *Brown* v. *Sibley*, 650 F.2d 760, 772 (5th Cir. 1981) (granting motion to dismiss based on lack of standing).

I. ALL CLAIMS AGAINST BARCLAYS CAPITAL AND BARCLAYS BANK ARE TIME-BARRED.

A. All Claims Against Barclays Capital and Barclays Bank Were Filed After the Applicable Limitations Period Expired.

In the Amended Complaint, plaintiffs assert a Section 10(b) and Rule 10b-5 claim against belatedly added defendants Barclays Capital and Barclays Bank, and a Section 12(a)(2) claim against Barclays Capital. All of these claims should be dismissed because they are barred by the applicable one-year statutes of limitations. In *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), the United States Supreme Court held that an action based on Section 10(b) of the 1934 Act "must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." *Id.* at 364. "The one-year 'discovery' limitations period begins to run on the date that the plaintiff discovers or in the exercise of reasonable diligence should have discovered" the facts forming the basis of the alleged violation. *See Reed* v. *Prudential Sec. Inc.*, 875 F. Supp. 1285, 1288 (S.D. Tex. 1995) (citing *Jensen* v. *Snellings*, 841 F.2d 600, 606 (5th Cir. 1988); *Vigman* v. *Community Nat'l Bank & Trust Co.*, 635 F.2d 455, 459 (5th Cir. 1981)). Likewise, Section 12(a)(2) claims must be brought "within one year after the discovery of the untrue statement or the

omission, or after such discovery should have been made by the exercise of reasonable diligence." *See* 15 U.S.C. § 77m.[5]

Here, plaintiffs had inquiry notice of the facts constituting the alleged securities law violations well over one year before they filed the Amended Complaint. On October 16, 2001, according to plaintiffs, Enron "shocked the markets with revelations of $1.0 billion in charges and a reduction of shareholders' equity by $1.2 billion. Within days, . . . the SEC announced an investigation of Enron, and Fastow, Enron's Chief Financial Officer, resigned." (*See* Am. Compl. ¶ 61.) The first complaint in this consolidated case, which asserted claims pursuant to Sections 10(b) and 20(a) of 1934 Act and Rule 10b-5 thereunder, was filed six days later on October 22, 2001. (*See Newby* v. *Enron Corp. et al.*, No. H-01-3624 (S.D. Tex.).) On November 8, 2001, Enron made, according to plaintiffs, a "huge" restatement of its financial results for 1997 through 2000. (*See* Am. Compl. ¶ 63.) Less than a month later, on December 2, 2001, Enron filed for bankruptcy — the largest bankruptcy in history at the time. (*See id.* ¶ 66.)[6] Plaintiffs clearly had notice of the facts constituting the alleged violations now

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[5] A Section 12(a)(2) claim must be brought no later than three years after the date of the sale of the securities in question. *See* 15 U.S.C. § 77m. As discussed *infra* in Section II.A, the named plaintiffs have not alleged that they purchased any of the LEOs in the Yosemite Securities Offering, let alone within the three-year limitations period. Accordingly, plaintiffs' Section 12(a)(2) claim concerning the Yosemite Securities Offering is also barred by the three-year statute of repose. *See id.*

[6] On December 4, 2001, counsel for Lead Plaintiff filed a complaint in the name of one of the named plaintiffs here, on behalf of a putative class of Enron shareholders, asserting claims under Sections 10(b), 20A and 20(a) of the 1934 Act and Rule 10b-5 thereunder and Sections 11 and 15 of the 1933 Act. *See Amalgamated Bank* v. *Lay*, No. H-01-4198 (S.D. Tex.). Thus, by that date there not only was notice of the facts constituting the alleged securities laws violations, but those matters were actually pleaded in a complaint alleging such violations.

being asserted by October 16, 2001 when Enron announced it was taking a billion dollar charge and reducing shareholder equity by over a billion dollars, and *a fortiori* by December 2, 2001 when Enron filed for bankruptcy. *See Westchester Corp.* v. *Peat, Marwick, Mitchell & Co.*, 626 F.2d 1212, 1217-18 (5th Cir. 1980) (holding plaintiffs had a duty to investigate when auditors had withdrawn financial statement certification, had asked to withdraw from the audit unless released from liability, had been dismissed, and two lawsuits had been filed alleging fraudulent financial statements); *Rahr* v. *Grant Thornton LLP*, 142 F. Supp. 2d 793, 799 (N.D. Tex. 2000) ("knowledge of the possibility of a claim is sufficient to put a plaintiff on inquiry notice and to trigger commencement of the limitations period").

Moreover, even if Enron's restatement and its bankruptcy filing had not provided notice by late 2001 — and they clearly did — the allegations contained in the Consolidated Complaint filed on April 8, 2002 demonstrate that plaintiffs were aware by that time (at the very latest) of the facts forming the basis of the alleged securities law violations now being asserted in the Amended Complaint against Barclays Capital and Barclays Bank. The Amended Complaint's allegations concerning the Barclays defendants' transactions with Enron are virtually identical to those that were asserted in the prior Consolidated Complaint more than a year ago. Moreover, the Consolidated Complaint specifically alleged that "Barclays underwrote" the Yosemite Securities Offering. (*See* Consol. Compl. ¶ 753.) Accordingly, the statute of limitations began to run on *all* claims asserted in the Amended Complaint against Barclays Capital and Barclays Bank on April 8, 2002 at the very latest (and in fact much earlier). Because

these claims were not brought until May 14, 2003 — more than one year later — the Court should dismiss them as time-barred.[7]

B. Plaintiffs Are Not Entitled To "Relation Back" Under Rule 15(c).

Because all of plaintiffs' claims against Barclays Capital and Barclays Bank are time-barred, they can only survive if the filing of the Amended Complaint "relates back" to the date of the filing of the Consolidated Complaint under Federal Rule of Civil Procedure 15(c).[8] For relation back under Rule 15(c)(3) — the portion of the Rule addressing amendments adding parties — it must be the case *both* that (i) plaintiffs "mistakenly" named Barclays PLC as a defendant in the prior Consolidated Complaint, *and* (ii) Barclays Capital and Barclays Bank knew or should have known that the only

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[7] Likewise, plaintiffs' derivative claims under Section 20(a) of the 1934 Act and Section 15 of 1933 Act, which are subject to the same limitations periods as the underlying Sections 10(b) and 12(a)(2) claims, are also time-barred. *See Theoharous* v. *Fong*, 256 F.3d 1219, 1228 n.12 (11th Cir. 2001) (Section 20(a) claims are derivative of Section 10(b) claims); *Lone Star Ladies Inv. Club* v. *Schlotzky's Inc.*, 238 F.3d 363, 370 n.33 (5th Cir. 2001) ("controlling person liability under Section 15 . . . is derivative of liability under Sections 11 and 12(2).")

[8] Rule 15(c) provides that:

> [a]n amendment of a pleading relates back to the date of the original pleading when (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action such that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

reason they were not named defendants in the Consolidated Complaint was because of a mistake by plaintiffs. Neither is true here.[9]

1. Relation Back Is Not Available To Add Parties Where There Was No Mistake Within the Meaning of Rule 15(c)(3).

Rule 15(c) was not enacted to provide plaintiffs with a general means of avoiding applicable statutes of limitations. *See Miller* v. *Calvin*, 647 F. Supp. 199, 202 (D. Colo. 1985) ("Rule 15(c) was obviously not enacted to serve as a general bypass for statutes of limitation.") Rather, Rule 15(c) applies only in certain limited and well-defined situations where it is necessary "to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors." *See* FED. R. CIV. P. 15(c), Advisory Committee Notes (1991); *see also Jacobsen* v. *Osborne*, 133 F.3d 315, 320 (5th Cir. 1998) (holding "Rule [15(c)] 'is meant to allow an amendment changing the name of a party to relate back to the original complaint only if the change is the result of an error, such as misnomer or misidentification'") (quoting *Barrow* v. *Wethersfield Police Dept.*, 66 F.3d 466, 469 (2d Cir. 1995)); *see also Miller*, 647 F. Supp. at 202.

Consistent with its limited purpose, the Fifth Circuit has held that Rule 15(c)(3) applies in only two situations. First, Rule 15(c)(3) applies to correct a

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[9] Plaintiffs have not pleaded a mistake as to the identity of the proper party, which is itself a sufficient ground to dismiss the Amended Complaint. *See Assoc. General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519, 526 (1983) (in deciding motions to dismiss, courts should not assume a plaintiff can prove facts not alleged); *see also Schach* v. *Ford Motor Co.*, 210 F.R.D. 522, 527 (M.D. Pa. 2002) (dismissing complaint on limitations grounds where "[p]laintiff has not alleged any mistake as to the identity of the proper party" and noting that court not obligated to assume plaintiff can prove facts not alleged).

misnomer (*i.e.*, where the party that the plaintiff intended to sue is in fact before the court but merely misnamed). *See Jacobsen*, 133 F.3d at 320; *see also* FED. R. CIV. P. 15(c), Advisory Committee Notes (1991) ("a complaint may be amended at any time *to correct a formal defect such as a misnomer or misidentification*") (emphasis added); *Reyna* v. *Flashtax, Inc.*, 162 F.R.D. 530, 533 (S.D. Tex. 1995).[10] Second, Rule 15(c)(3) applies where the plaintiff has mistakenly sued the wrong defendant and thereafter amends the complaint to substitute the proper party for the mistakenly named defendant. *See Jacobsen* at 320 ("but for [plaintiff's] *mistaken belief* that Officer Osborne was the arresting officer, the action would have been brought against" other officers.) Neither circumstance is present here.

Plaintiffs cannot seriously contend that they misnamed, or mistakenly asserted claims against, Barclays PLC in the Consolidated Complaint; any such contention would be refuted by the fact that plaintiffs have again named Barclays PLC as a defendant in the Amended Complaint along with newly added defendants Barclays Capital and Barclays Bank. Courts have consistently recognized that attempts to add parties, as plaintiffs seek to do here, cannot satisfy the "mistake" requirement of Rule 15(c)(3). *See, e.g., Gridley* v. *Cunningham*, 550 F.2d 551, 553 (8th Cir. 1977)

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[10] Several courts have held that relation back pursuant to Rule 15(c) is available *only* to correct a misnomer. *See, e.g., Worthington* v. *Wilson*, 8 F.3d 1253, 1257 (7th Cir. 1993); *Cox* v. *Treadway*, 75 F.3d 230, 240 (6th Cir. 1996); *Rennie* v. *Omniflight Helicopters Incorp.*, No. 97-1524, 1998 WL 743678, at *2 (4th Cir. Oct. 23, 1998); *Sundel* v. *United States*, No. 95-1541, 1995 WL 597221, at *1 (1st Cir. Oct. 5, 1995); *Duckworth* v. *Brunswick Corp.*, No. Civ. A. 700CV120R, 2001 WL 406234, at *1 (N.D. Tex. April 17, 2001); *Blanco* v. *Continental Oil Co.*, No. Civ. A. 99-0740, 2000 WL 575935 (E.D. La. May 11, 2000); *Grigsby* v. *Johnson*, Civ. No. 95-213, 1996 WL 444052, at *6 (D.D.C. May 14, 1996); *Scharrer* v. *Consolidated Rail Corp.*, 792 F. Supp. 170, 172 (D. Conn. 1992).

(denying plaintiff's attempt to add party where there was no mistake concerning identity of original party sued); *Arachnid, Inc.* v. *Valley Recreation Products, Inc.*, No. 98C50282, 2001 WL 1664052, at *7 (N.D. Ill. Dec. 27, 2001) (no relation back where plaintiff seeking to add party after limitations period has run not because of mistake, but "to cast its net wider"); *Slater* v. *Skyhawk Transportation, Inc.*, 187 F.R.D. 185, 196 (D.N.J. 1999) (mistake element not satisfied where plaintiff does not seek to substitute one defendant for another but instead seeks to add an additional defendant); *Kemp Industries, Inc.* v. *Safety Light Corp.*, Civ. A. No. 92-95, 1994 WL 532130, at *14 (D.N.J. Jan. 25, 1994) (the "fact that Plaintiffs continued, and still continue, to assert their claims against Safety Light after Prudential had been named undercuts any contention that Safety Light was mistakenly named in the Complaint"); *Advanced Magnetics, Inc.* v. *Bayfront Partners, Inc.*, No. Civ. 6879, 1994 WL 324018, at *3 (S.D.N.Y. July 6, 1994) ("[R]ule [15(c)]'s aim is clearly not to absolve a plaintiff of the consequences of a deliberate strategic decision to exclude a particular plaintiff or defendant"); *Jordan* v. *Tapper*, 143 F.R.D. 575, 590 (D.N.J. 1992) (dismissing amendment for failure to satisfy requirements of 15(c)(3) because "[i]t is clear that the plaintiff does not intend to *substitute* these new defendants for a mistakenly named defendant in the original complaint") (emphasis added).

In the absence of misnomer or mistaken identity, plaintiffs are not entitled to relation back even if the reason they only named Barclays PLC in the prior pleading was a lack of knowledge as to the identify of the "proper" defendants. *See, e.g.*, *Duckworth*, 2001 WL 406234, at *2 (noting that the "goal of Rule 15(c)(3) is to allow parties to correct their mistakes, not to allow them an indefinite amount of time in which

to discover who the proper parties actually are"); *accord Baskin* v. *City of Des Plaines*, 138 F.3d 701, 704 (7th Cir. 1998); *Barrow*, 66 F.3d at 470. In any event, plaintiffs *were* aware of Barclays Bank and Barclays Capital when they filed the Consolidated Complaint. (*See* Consol. Compl. ¶ 106 ("Defendant Barclays PLC is a large integrated financial services institution that through its controlled subsidiaries and divisions (such as Barclays Capital (collectively "Barclays"))"); *see also* Powers Report at 49, 50 ("240 million unsecured subordinated loan to Chewco from Barclays Bank PLC, which Enron would guarantee").) Plaintiffs clearly made a strategic decision to name only Barclays PLC in the Consolidated Complaint, and not any of its subsidiaries.

2. Barclays Capital and Barclays Bank Were Not on Notice that Plaintiffs' Failure To Sue Them Was a Mistake.

Even assuming, contrary to plaintiffs' allegations, that plaintiffs named only Barclays PLC as a defendant by mistake, Rule 15(c)(3) also requires that Barclays Capital and Barclays Bank knew or should have known that the only reason they were not named as defendants in the Consolidated Complaint was because plaintiffs made a mistake in naming Barclays PLC instead of them. *See Jacobsen*, 133 F.3d at 320 (both notice and mistake elements of Rule 15(c)(3) must be satisfied). This requirement is not satisfied either.

Here, the fact that plaintiffs were aware of the involvement of subsidiaries of the financial institutions, but nonetheless chose to sue only the parent companies of the financial institutions in the Consolidated Complaint, indicated that the subsidiaries were not named for some reason other than mistake. (*See* Consol. Compl. ¶¶ 100-108.) Although "the [unnamed] party is under no duty to speculate as to the reason plaintiff has

not pursued him," *see Miller*, 647 F. Supp. at 202, plaintiffs' allegations here reflect a deliberate decision to sue only the parent companies of the financial institution defendants for the acts of their allegedly "controlled" subsidiaries. (*See* Consol. Compl. ¶¶ 100-108.) Accordingly, unnamed parties without notice that they escaped litigation only because of a mistake, such as Barclays Capital and Barclays Bank, are entitled to dismissal of an untimely complaint. *See Rendall-Speranza* v. *Nassim*, 107 F.3d 913, 918 (D.C. Cir. 1997) ("potential defendant who has not been named in a lawsuit by the time the statute of limitations has run is entitled to repose — unless it is or should be apparent to that person that he is the beneficiary of a mere slip of the pen, as it were.")

II. PLAINTIFFS' CLAIMS UNDER SECTIONS 12(a)(2) AND 15 OF THE 1933 ACT CONCERNING THE YOSEMITE SECURITIES OFFERING SHOULD BE DISMISSED.

Plaintiffs' claims against Barclays Capital and Barclays PLC under Sections 12(a)(2) and 15 of the 1933 Act, respectively, should be dismissed for two additional reasons — each alone a sufficient ground. First, the Amended Complaint does not allege that any of the named plaintiffs purchased any of the LEOs in the Yosemite Securities Offering, and therefore they lack standing to assert any claims under Sections 12(a)(2) and 15. Second, the Yosemite Securities Offering was a non-public offering outside the United States in accordance with Regulation S of the 1933 Act. Thus, the Offering Memorandum upon which the Section 12(a)(2) claim purports to be predicated is not a prospectus, and therefore cannot give rise to a Section 12(a)(2) claim.

A. Named Plaintiffs Lack Standing To Assert Claims Under Sections 12(a)(2) and 15 of the 1933 Act Because None Is Alleged to Have Purchased the LEOs.

Plaintiffs' claims under Sections 12(a)(2) and 15 of the 1933 Act against Barclays Capital and Barclays PLC, respectively, are based on the Yosemite Securities Offering of LEOs. (*See* Am. Compl. ¶¶ 106(b)-(c), 641.12-641.16, 1016.4.) However, Lead Plaintiff does not allege that it, or any other named plaintiff, actually purchased any of these LEOs. (*See* Am. Compl. ¶¶ 79-81.)[11] Not having purchased these securities, named plaintiffs cannot have suffered any injury with respect to the allegedly misleading statements made in connection with the offering; and without injury, they have no standing to sue. *See, e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also In re Paracelsus Corp. Sec. Litig.*, 6 F. Supp. 2d 626, 631 (S.D. Tex. 1998) (dismissing 12(a)(2) claims because "[p]laintiffs . . . do not allege that any named plaintiff purchased or acquired any of the Paracelsus notes at issue"); *see also Brown*, 650 F.2d at 771 (holding that named plaintiffs in class action lack standing to sue for injuries to a purported class where named plaintiffs "failed to make even the threshold showing that they suffered the particular injury [forming the basis for their claims]").

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[11] Given that Lead Plaintiff has failed to allege that it or any named plaintiff actually purchased any of the LEOs offered in the Yosemite Securities Offering, plaintiffs have not alleged and cannot allege that Barclays Capital sold the LEOs to, or solicited the purchase by, any named plaintiff. Accordingly, plaintiffs also have failed to allege that Barclays Capital is a statutory seller under Section 12(a)(2). *See, e.g.*, *Dartley* v. *ErgoBilt, Inc.*, No. Civ. A. 398CV1442M, 2001 WL 313964, at *2 (N.D. Tex. Mar. 29, 2001) (dismissing Section 12(a)(2) claim because plaintiff failed to allege that underwriter defendants either passed title to plaintiffs as direct seller or solicited the transaction in which title passed to them); *see also Rosenzweig* v. *Azurix Corp.*, No. 02-20804, 2003 WL 21242319, at *14 (5th Cir. June 13, 2003) (Section 12(a)(2) seller is "the person who actually passes title to the buyer, or 'the person who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner.'") (*citing Pinter* v. *Dahl*, 486 U.S. 622, 647 (1988)).

Without individual standing to sue, the named plaintiffs cannot sue on behalf of a purported class of which they are not members. As the Fifth Circuit held in *Brown*, class action plaintiffs cannot predicate standing on an injury that they do not share with the class, and "the proper procedure when the class plaintiff lacks individual standing is to dismiss the complaint." 650 F.2d at 771; *see also In re Paracelsus Corp. Sec. Litig.*, 6 F. Supp. 2d at 631; *East Texas Motor Freight System Inc.* v. *Rodriguez*, 431 U.S. 395, 403 (1977) ("a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members") (citation omitted); *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974) ("if none of the named plaintiffs purporting to represent a class establishes the requisite [standing], none may seek relief on behalf of himself or any other member of the class").[12]

B. The Yosemite Securities Offering Was Not Made Pursuant to a Prospectus.

The claims under Sections 12(a)(2) and 15 of the 1933 Act asserted against Barclays Capital and Barclays PLC, respectively, should also be dismissed because the Offering Memorandum for the Yosemite Securities Offering is not a

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[12] For the same reasons, plaintiffs lack standing to assert any claim under Section 10(b) of the 1934 Act and Rule 10b-5 with respect to the Yosemite Securities Offering. *See 7547 Corp.* v. *Parker & Parsley Development Partners, L.P.*, 38 F.3d 211, 226 (5th Cir. 1994) (*citing Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 749, 755 (1975)) ("[s]tanding under [§ 10(b) of the 1934 Act and Rule 10b-5] requires that a plaintiff be an actual 'purchaser' or 'seller' of securities who has been injured by deception or fraud 'in connection with' the purchase or sale.") Accordingly, all claims in this case against Barclays Capital — which arise only from the Yosemite Securities Offering — should be dismissed for lack of standing. To the extent that plaintiffs contend that they assert claims against Barclays Capital based on anything other than the Yosemite Securities Offering, there are no allegations sufficiently pleaded under Rule 9(b) and the PSLRA's pleading requirements to support such claims. *See, e.g., In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 865 n.14 (S.D. Tex. 2001) (*citing Williams* v. *WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997).)

prospectus. Section 12(a)(2) of the 1933 Act requires a material misstatement or omission "by means of a prospectus or oral communication." *See* 15 U.S.C. § 77l. The Supreme Court has held, however, that unregistered, non-public offerings cannot form the basis for a Section 12(a)(2) claim because such offerings are not made through a "prospectus" as that term is defined under the federal securities laws. *See Gustafson* v. *Alloyd Co., Inc.*, 513 U.S. 561, 576 (1995) (liability imposed by Section 12(2) — now Section 12(a)(2) — applies only to public offerings by issuers and their controlling shareholders); *see also Maldonado* v. *Dominguez*, 137 F.3d 1, 8-9 (1st Cir. 1998) (dismissing plaintiffs' Section 12(a)(2) claim because the alleged securities offering was private and, thus, not made pursuant to a prospectus within the meaning of the federal securities laws); *In re Sterling Foster & Co., Inc., Sec. Litig.*, 222 F. Supp. 2d 216, 246 (E.D.N.Y. 2002) ("because the plaintiffs fail to allege that they purchased the securities in a public offering, as opposed to in the aftermarket, their Section 12(a)(2) claims are dismissed.")

Under this controlling precedent, the Yosemite Securities Offering Memorandum was not a prospectus and cannot form the basis for a Section 12(a)(2) claim. As indicated in the Offering Memorandum, the Yosemite Securities Offering was a non-public offering outside the United States pursuant to Regulation S of the 1933 Act. (*See* Hurwitz Aff., Exh. C, at 8.)[13] Indeed, plaintiffs nowhere even allege that the Yosemite Securities Offering was a registered public offering, or that the offering

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[13] The Court may consider the Yosemite Offering Memorandum on this motion because plaintiffs selectively quote from it in their Amended Complaint. *See In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d at 884.

involved a prospectus. (*See* Am. Compl. ¶¶ 641.12-641.16.) Accordingly, plaintiffs have failed to state a claim under Section 12(a)(2). *See Gustafson*, 513 U.S. at 576; *see also Maldonado*, 137 F.3d at 8-9. And without a Section 12(a)(2) claim, the derivative Section 15 "controlling person" claim against Barclays PLC fails as well. *See Lone Star*, 238 F.3d at 370 n.33 ("[C]ontrolling person liability under Section 15 . . . is derivative of liability under Sections 11 and 12(2).").

CONCLUSION

For the foregoing reasons, this Court should dismiss with prejudice (i) all claims asserted against Barclays Bank and Barclays Capital, and (ii) the controlling person claims against Barclays PLC under Section 15 of the 1933 Act and Section 20(a) of the 1934 Act.

Dated: June 18, 2003
Houston, Texas

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss of Barclays PLC, Barclays Bank PLC and Barclays Capital Inc. and Brief in Support has been served by sending a copy via electronic mail to serve@ESL3624.com on this 18th day of June, 2003.

I further certify that a copy of the foregoing Motion to Dismiss of Barclays PLC, Barclays Bank PLC and Barclays Capital Inc. and Brief in Support has been served, on this 18th day of June, 2003, via overnight mail on:

Carolyn S. Schwartz
United States Trustee, Region 2
33 Whitehall Street, 21st Floor
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